United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-2095

United States Court of Appeals

FOR THE SECOND CIRCUIT

TIVIS TROIT HAWKINS, II,

Plaintiff-Appellant,

against

J. E. LaVALLEE, Superintendent Clinton Correctional Facility, Dannemora, New York,

T. J. O'CONNOR, Secretary Institutional Media Review Committee, Clinton Correctional Facility, Dannemora, New York,

COMMISSIONER OF CORRECTION, Department of Correctional Services, Albany, New York,

RONALD HADDAD, Administrative Assistant Program Services, Department of Correctional Services, Albany, New York

Defendants-Appellees.

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Appellant submitted an extensive brief concerning the substantial first amendment issues raised on this appeal on October 12, 1976. Appellees, who had been directly involved in the progress of this appeal for over four months, responded raising the failure of service below for the first time despite numerous opportunities in the past four months to have raised this defect to appellant or to this Court. Appellees did not treat the merits. Appellees cannot properly rely on such technical arguments, where appellant has proceeded in total compliance with procedural requirements, as ground for remand at this stage because they have waived this defect by willfully failing to raise it in a timely manner. Appellees cannot rely Lewis v. Ward, No. 76-2062 (2d Cir. 1976) because the trial court's decision in the instant case is appropriate for this Court to review.

ARGUMENT

A. DEFENDANTS-APPELLEES HAVE WAIVED THE PROCEDURAL DEFECT

Defendants-appellees have waived their objection to jurisdiction on this appeal by failing to seek dismissal of this appeal by consent or by motion for four months after receiving notice of this Court's order granting appellant's motion for leave to proceed in forma pauperis and for

assignment of counsel. This Court cannot condone the course followed by the appellees in this case where in its brief for the first time the service issue is raised and where the appellees choose not to avail themselves of the many appropriate means of raising this issue, including a motion pursuant to F.R.A.P. 27. Rather, the Attorney General has purposely concealed from this Court for months his intent to avoid justice at the eleventh hour and has also concealed this ploy from appellant's counsel thereby causing this Court and counsel to commit considerable resources to the prosecution of this appeal. Appellees now argue that the judicial processes have been used futilely and want to wipe the appellate slate clean. No legitimate ground exists for the appellees' delay in raising the objection as to failure of summons.

Appellant proceeding pro se brought a civil rights claim against state corrections officials for substantial first amendment deprivations on April 2, 1975 and filed a valid affidavit in forma pauperis. There is no suggestion that plaintiff has failed to pursue his legal remedies properly and expeditiously. Shortly thereafter, Hon. J.P. McLane, U.S. Magistrate for the Northern District of New York, wrote to state corrections officials seeking the applicable regulations to be used by the trial court in determining plaintiff's claim.

Hon. Edmund Port accepted plaintiff's affidavit and granted leave to proceed in forma pauperis. Concededly, the trial court failed, in derogation of plaintiff's rights pursuant to 28 U.S.C. § 1915(c), to serve the Attorney General with his complaint.* Plaintiff, however, was in no way responsible for this failure, did not know of this failure, and as a pro se prisoner had, in fact, less control over these proceedings than litigants ordinarily are able to exercise. The trial court without holding a hearing granted sua sponte summary judgment for the defendants on January 28, 1976, having considered the complaint and numerous documentary exhibits.

The Attorney General's position on appeal is nothing more than game-playing and gimmickry. His procedural argument is transparent, disclosing appellees' sole purpose -- to further frustrate, delay and prejudice appellant's legitimate attempt to seek redress of significant first amendment deprivations. This Court must not approve the use of technical arguments by the Attorney General, supported only by

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* Defendants-appellees suggest that F.R. Civ. P. 4 governs service in these circumstances. This position is in error. Congress has specifically treated service of process in 28 U.S.C. § 1915(c). This specific provision controls service in these circumstances and the general provision of F.R. Civ. P. 4 does not apply. See e.g., Davis v. Department of Corrections, 446 F.2d 644 (9th Cir. 1971); Potter v. McCall, 433 F.2d 1087 (9th Cir. 1970).

his pretense of surprise, to the prejudice of appellant, who has not committed procedural error.

The Attorney General's office has participated in the proceedings on this appeal for over four months and has been aware of the consequences of its failure to articulate its reliance on the procedural defect. See attached Exhibit-Affidavit of Paula A. Sweeney. The irresponsible and unprofessional nature of this failure is underscored by the fact that the Attorney General raised this very same technical defect in this Court on August 27, 1976 in the Lewis case.

The Attorney General's office was served with this Court's decision of July 2, 1976 granting Mr. Hawkins' motion for leave to proceed in forma pauperis and for assignment of counsel. Sometime thereafter a particular assistant attorney general was assigned to this appeal. Yet, the Attorney General did not raise the procedural defect. The Attorney General's office was required by F.R.A.P. 12(b) to be notified of the filing of the record on appeal in this Court. Again, the Attorney General, made aware of progress of this appeal, did not raise the jurisdictional defect which defendants-appellees now argue deprives this Court of jurisdiction to hear this appeal. The Attorney General was subsequently served with the order appointing counsel dated August 23, 1976. The Attorney General continued his failure to raise

the issue of service below. Counsel spoke by telephone with Mr. Gerald J. Ryan, the assistant attorney general assigned to this case, on at least three occasions during the first two weeks of September. Mr. Ryan did not seek appellant's cooperation in seeking remand based on jurisdictional defect. Counsel sent to the Attorney General copies of correspondence with state corrections officials seeking a copy of the applicable regulations -- in fact, Mr. Ryan indicated to counsel that he also was seeking the applicable regulation to begin work on the appellate papers!

The Attorney General's brief in the Lewis case, essentially the same as that filed in this case, was filed in this Court on August 27, 1976, four days after counsel was appointed for appellant.*

Counsel spoke with Mr. Gerald Ryan on September 17, 1976, seeking his consent to an extension of time to file appellant's brief, and the Attorney General was personally served with counsel's motion based on counsel's need for the applicable state guidelines. The Attorney General failed to break his silence as to the inappropriateness of briefing and arguing the merits of this case.

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* First Assistant Attorney General Samuel A. Hirshowitz appears of counsel on both the Lewis brief and the Attorney General's brief in this case.

The Attorney General was served with the order dated September 20, 1976 granting the extension and setting forth a new briefing schedule. Again, appellees eschewed the appropriate means of raising what they now claim is a fatal flaw and knowingly allowed the processes of this Court to continue. Appellees now argue that these processes were used in vain, not because they would be prejudiced by the hearing of this appeal, not because the record is not developed sufficiently, not because this Court is an improper forum for constitutional review of an obscenity determination, for appellees cannot legitimately support any of these arguments. They argue that this appellate process has been wasted simply because the procedure below did not give plaintiff the rights granted in 28 U.S.C. § 1915(c).

By failing to raise the procedural issue for such an extended period during which counsel and this Court had numerous contacts with the Attorney General, defendants-appellees have waived their objection. Concededly, the failure of service on defendants was in derogation of plaintiff's rights pursuant to 28 U.S.C. § 1915(c). Service is a defect which must be raised without undue delay. See Moore's Federal Practice § 12.23 and cases cited therein; Alger v. Hayes, 452 F.2d 841 (8th Cir. 1972); Engineers Association v. Sperry Gyroscope Co., 251 F.2d 133 (2d Cir. 1957); Maricopa County v. American Petrofino, Inc., 322

F. Supp. 467 (N.D. Cal. 1971); Banking & Trading Corp. v. Reconstruction Finance Corp., 15 F.R.D. 360 (S.D.N.Y. 1954) (Kaufman, J.). The behavior of the Attorney General in failing to raise this technicality prior to a significant commitment of resources of this Court and counsel is inexcusable. Defendants-appellees must not be allowed to obtain further delay due to the delay caused solely by their silence. As their failure to raise any legitimate reason for remand indicates, defendants-appellees are blatantly seeking to delay justice for Mr. Hawkins, and through delaying justice they seek to deny justice to Mr. Hawkins.

The Court should not condone the Attorney General's attempt to exacerbate the failure of the Northern District to comport with procedure mandated by 28 U.S.C. § 1915(c) especially where Mr. Hawkins was in no way responsible, where the Attorney General has not demonstrated any prejudice, and where further proceedings in the Northern District would almost certainly require this Court to review essentially the same determination of obscenity.

The actions of the Attorney General in this case are reminiscent of the recklessness of counsel recently commented upon by this Court. See In Re John Joseph Sutter, Esq., No. 70-1194 (2d Cir. Oct. 20, 1976); Aceredo v. Immigration and Naturalization Service, 538 F.2d 918 (2d Cir. 1976). By failing to act with a reasonable degree of

attentiveness to responsibilities to this Court, the Attorney General has recklessly, if not willfully, caused the same type of inconvenience and waste of judicial resources as did counsel in the Sutter case.

B. LEWIS IS NOT DISPOSITIVE BECAUSE THE DEFENDANTS WERE NOT DEPRIVED OF THE OPPORTUNITY TO SEEK SUMMARY JUDGMENT BY THE LOWER COURT AND BECAUSE THIS APPEAL PRESENTS THE SAME OPPORTUNITY TO ARGUE THE OBSCENITY ISSUE.

Appellees reliance on Lewis is misplaced. The trial court in Lewis dismissed plaintiff's complaint shortly after its receipt and in the posture of a motion to dismiss for failure to state a claim. In the instant case, the trial court did not dismiss for failure to state a claim; rather, the case was pending in the District Court for over nine months before a decision on the merits in the nature of summary judgment. The U.S. Magistrate for the Northern District requested the applicable state regulations. The trial court had the benefit of numerous plaintiff's exhibits as well as the applicable regulations and reached the merits of plaintiff's claim, ruling against plaintiff in the nature of summary judgment. Thus this case is not in the "awkward posture" noted by Chief Judge Kaufman in his majority opinion in the Lewis case.

Additionally, as noted in Appellant's Brief at p. 16, federal appellate courts are appropriate forums for the

resolution of obscenity determinations and are to review such determinations in an independent constitutional judgment on the facts.

In Lewis, the Attorney General urged that he might have chosen the summary judgment route. Here the defendants were awarded a favorable judgment via the summary judgment route. The Attorney General in his five page brief has failed to suggest any possible prejudice in arguing the legal issue of obscenity in this forum, choosing instead to rely on a technicality. Interestingly, the Attorney General has simply filed a brief in this case containing exactly the same one page argument as that used in Lewis.

CONCLUSION

For the reasons stated above and in appellant's main brief, the district court's determination of obscenity should be reversed, the officials' unconstitutional practices enjoined, and the case remanded for determination of damages.

In the alternative, if this Court vacates for lack of jurisdiction, this Court should instruct the district court to proceed with this case in forma pauperis and to

assign counsel immediately and this Court should make such additional instructions as are just and proper.

Dated: New York, New York
November 20, 1976

Respectfully submitted,

PAULA A. SWEENEY

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(212) 541-5800

Exhibit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TIVIS TROIT HAWKINS, II, :

Appellant, :

-against- : No. 76-2095

J.E. LaVALLEE, Superindendent, et al., : AFFIDAVIT

Appellees. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PAULA A. SWEENEY, being duly sworn, deposes and says:

1. I am a member of the bar of this Court. By order of this Court dated August 23, 1976 (Meskill, J.), I was appointed as counsel for Plaintiff-Appellant.

2. Prior to my appointment, this Court had granted Plaintiff-Appellant's pro se motion for leave to proceed in forma pauperis and had ordered that counsel be assigned on July 2, 1976.

3. The docket clerk for this case informed deponent that the Attorney General of the State of New York was served

with the court orders referred to in paragraphs 1 and 2 by mail on August 23, 1976 and on July 2, 1976 respectively.

4. Deponent telephoned the Attorney General's office during the week of September 6, 1976 and was informed by the receptionist upon supplying the name and docket number of this case that Assistant Attorney General Gerald J. Ryan was handling the case.

5. During the course of at least two subsequent conversations, the undersigned asked Mr. Gerald J. Ryan for suggestions as to sources for and assistance in obtaining Administrative Bulletin 60 which contains the regulations applicable in this case. Mr. Ryan indicated that he also needed to obtain the regulations to work on the Attorney General's appellate papers.

6. Deponent pursued Mr. Ryan's suggested sources by telephone without result.

7. The undersigned telephoned Mr. Ryan on September 17, 1976 at which time she informed him of her continued lack of success in obtaining the applicable regulations and asked his consent to a two-week extension. He consented.

8. The undersigned made a motion for such extension and served the Attorney General, Gerald J. Ryan, of counsel, by means of personal service.

9. Counsel's motion for extension was granted and the Attorney General was sent the new scheduling order.

10. The undersigned wrote to the Commissioner of Corrections on September 27, 1976 in her continued efforts to obtain the applicable regulations. A copy of this letter was sent to the Attorney General, Gerald J. Ryan, of counsel.

11. The undersigned filed Appellant's main brief in this appeal on October 12, 1976. The Attorney General, Gerald J. Ryan, of counsel, was personally served with this brief.

12. The undersigned received the Defendants-Appellees' Brief on November 16, 1976. This brief was the first indication to counsel that the Defendants-Appellees' sought remand on grounds of personal jurisdiction.

Paula A. Sweeney

Paula A. Sweeney

Sworn to before me this
20th day of November, 1976.

Wallace Mahr

Notary Public

WALLACE MAHR
Notary Public, State of New York
24-4520569
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

COPY OF THE WITHIN PAPER
RECEIVED
1970
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ATTORNEY GENERAL